Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

TERRY R. BOERST,
Petitioner,

v.

GENERAL MILLS OPERATIONS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it error for the Court of Appeals to hold that concentrating and maintaining stamina were not major life activities under the Americans With Disabilities Act and that on the record of this case Petitioner did not demonstrate that he was disabled because his ability to sleep was not substantially impaired when uncontroverted medical testimony substantiated an anxiety disorder seriously affecting Petitioner's ability to sleep?

2. Was it error for the Court of Appeals to hold that Petitioner was not substantially limited in the major life activity of working when in fact an eight hour per day restriction effectively precluded him from working more that eight hours per day in any job in the Respondent's Plant?

3. Was it error for the Court of Appeals to conclude at the summary judgment stage of proceedings that Petitioner's admission that his anxiety disorder and its effect on his sleeping was somewhat ameliorated by the medication Zoloft precluded the court from finding that petitioner was disabled with the meaning of the Americans with Disabilities Act when in fact uncontroverted medical evidence including respondent's independent medical examiner noted that the petitioner's condition was ongoing and permanent during the pertinent time period and when the Court of Appeals ignored petitioner's explanatory affidavit?

4. Was it error for the Court of Appeals to conclude that petitioner was not disabled within the meaning of the Americans with Disabilities Act without giving consideration to petitioner's alternative contentions that he fell within statutory protection because of his record of impairment and/or because of respondent's perception of or regarding him as disabled?

PARTIES TO THE PROCEEDING

Terry R. Boerst, Petitioner and Plaintiff-Appellant below, is an hourly employee who was and is employed by Respondent. Mr. Boerst has been employed by Respondent since August of 1971.

Respondent, Defendant-Appellee below, General Mills Operations, Inc., is a corporation headquartered in Minneapolis, Minnesota with a plant at all times material hereto in Toledo, Ohio. The publicly owned parent corporation is General Mills, Inc. General Mills Operations, Inc. is a subsidiary of General Mills, Inc.

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The Opinion of the United States Court of Appeals for the Sixth Circuit in *Terry R. Boerst v. General Mills Operations, Inc.*, Case No. 00-3281, filed on January 15, 2002 is unreported and is included in the Appendix at Appendix A at page 1a.

The Judgment Entry of the District Court for the Northern District of Ohio and the accompanying Memorandum and Order entered on January 31, 2000 in Terry R. Boerst v. General Mills Operations, Inc. are unreported and are set forth in the Appendix at Appendix B at page 12a.

JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court for the Northern District of Ohio, Western Division was entered on January 15, 2002. This decision is unpublished and was not recommended for publication by the Sixth Circuit. A copy of this decision is attached hereto as Appendix A at page 1a. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101 (c). The jurisdictional basis for federal jurisdiction in the Court of first instance was pursuant to The Americans with Disabilities Act, 42 U.S.C. Sections 12101 et seq. Jurisdiction was invoked pursuant to 28 U.S.C. Section 1331. Petitioner also invoked the District Court's Supplemental Jurisdiction pursuant to 28 U.S.C. Section 1367 for the Fourth Claim for Relief which set forth a claim of handicap discrimination under Ohio Revised Code Section 4112.99 as amended.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

The Statutes involved, the Americans with Disabilities Act, 42 U.S.C. Sections 12101 et seq., and Ohio Revised Code Sections 4112.02 (A) and 4112.99 as amended, are set forth in pertinent part in Appendix C and D at pages 25 a and 42a.

STATEMENT OF THE CASE

Statement of Facts

Petitioner is a long standing hourly employee of the Respondent, having been hired in August of 1971. Petitioner worked for Respondent as an hourly forklift operator. The action involves a medical restriction resulting from Petitioner's medically diagnosed and documented conditions of panic disorder, anxiety, and depression that prohibited him from working more than eight (8) hours in a work day. Petitioner has regularly worked more that forty (40) hours per week for Respondent, frequently working eight (8) hours per day for seven (7) days per week. Medical records from Petitioner's primary care physician in the record indicate that the doctor first suggested this maximum eight hour workday in July 30, 1996 for anxiety attacks arising out of job stress. Respondent honored this medical restriction until May 14, 1997, accommodating Petitioner's request to work no more than eight (8) hours in a single day. For a period of approximately six months commencing May 14, 1997, Respondent refused to accommodate Petitioner's request for a daily schedule of no more that eight (8) hours per day. On or about November 10, 1997, Respondent resumed its

accommodation of Petitioner's request, and has continued to do so to the present time.

Throughout the period of time at issue, i.e., May 14, 1997 through November 10, 1997, Petitioner put Respondent on notice of the nature and severity of his mental impairments through numerous reports and medical records if his primary care physician, his treating psychologist, and a clinical therapist. Moreover, these findings were corroborated by the findings in an independent psychiatric exam performed at the request of the Respondent in October of 1997.

In his deposition, Petitioner did state that the medication Zoloft did relieve his symptoms somewhat. However, Zoloft was not prescribed until midway through the period at issue and the contemporaneous psychiatric records at the time, reference continued sleep and anxiety problems into late October of 1997, after Zoloft was prescribed. Petitioner's psychiatrist also noted in September of 1997 that his patient suffered from panic disorder and depression which is permanent. The independent medical examiner also concluded in late October of 1997 that Petitioner's problems affected his sleeping and that symptoms were increasing over the last 6-12 months.

The record is replete with medical evidence from Petitioner's treating primary care physician, his psychiatrist, and a clinical therapist whom Petitioner was referred to by his primary care physician. The clinical therapist opined in late June of 1997 that Petitioner suffered from anxiety and anxiety attacks, difficulty sleeping, poor concentration and that these symptoms appeared to be causing significant distress for Petitioner at work and outside of work. Petitioner's primary care physician and psychiatrist both concluded that his condition was permanent and that he should be limited to

eight hours per work daily. The office notes of Petitioner's treating psychiatrist during the critical period noted in pertinent part significant sleep disturbance and poor concentration on August 5, 1997, "not sleeping" on August 12, 1997, "still not sleeping...sleep--go to bed 11-11:30--doesn't go to sleep until 4"...mind racing...passed out twice at work in past..." on August 19, 1997, "not sleeping well" on September 12, 1997, "sleep irregular" on October 8, 1997, and "only get 2-4 hours (of sleep)" on October 21, 1997. The IME physician also noted that Petitioner continued to experience difficulty sleeping, only 2-4 hour per night, a reduced ability to concentrate, and fluctuating sleep. The IME evaluation was conducted on October 20, 1997, near the end of the six month period. The IME physician noted that at date, Petitioner continued to report significant symptoms. See generally Appendix H at pages 69a - 75a.

Description of the Proceedings Below

Petitioner originally filed this action in the United States District Court for the Northern District of Ohio Western Division. Petitioner originally brought a claim against Respondent for an alleged breach of the labor contract under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a). Upon issuance of a right to sue letter by the Equal Employment Opportunity Commission, Petitioner filed an amended complaint adding claims under the Americans with Disabilities Act, 41 U.S.C. Sections 12101, and later stipulated to a dismissal of the labor contract action and dismissed the local and international unions as parties defendant. As the case proceeded to summary judgment in the District Court, then, Petitioner proceeded only on an Americans with Disabilities Act claim and Ohio law claims of handicap discrimination. See Appendix E and Appendix G at pages 44a and 66a. Accordingly, jurisdiction of Petitioner's

action in the District Court was based upon Federal Question Jurisdiction under 28 U.S.C. Section 1331. Jurisdiction of the supplemental Ohio law claim was based upon 28 U.S.C. Section 1367.

On January 31, 2000, the District Court in its Memorandum and Order, granted summary judgment to Respondent in all respects. The District Court reasoned that a reasonable jury could not find that Petitioner was significantly limited in the major life activity of working given that his condition was alleviated by medication. The District Court further reasoned that Petitioner's assertions that he was substantially limited in the major life activities of sleeping, concentrating, and maintaining stamina are not substantiated in the record of the case.

On January 15, 2002, the United States Court of Appeals for the Sixth Circuit affirmed the District Court in an unpublished opinion. The Sixth Circuit concluded that sleeping and working are major life activities under the ADA, but concentrating and maintaining stamina are not. The court held that the limitations that Petitioner stated were substantial limitations under the ADA were not substantial at all and noted that Petitioner conceded that the medication Zoloft alleviated the infirmities about which he complained. The Appellate Court applied its ADA analysis equally to Petitioner's Ohio law claim under *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Commission,* 421 N.E.2d 128, 131, (Ohio 1981).

Petitioner Terry R. Boerst has duly filed his petition for writ of certiorari within ninety days of the entry of this ruling. *Communist Party of Indiana v. Whitcomb,* 414 U.S. 441, 445-446 (1974); *FTC v. Colgate-Palmolive Co.,* 380 U.

S. 374, 384 (1965); *United States v. Healey,* 376 U. S. 75, 77-78:80 (1964).

ARGUMENT

A. The Court of Appeals erroneously concluded that concentrating and maintaining stamina were not major life activities under the Americans with Disabilities Act and erroneously concluded that Petitioner did not demonstrate that he was disabled because his ability to sleep was not substantially impaired despite clear medical evidence in the record of an anxiety disorder affecting Petitioner's ability to sleep.

The questions herein reveal confusion among the circuits with respect to what constitutes a major life activity under the Americans with Disabilities Act. In the within action, Petitioner contended that his anxiety disorder substantially limited him in the major life activities of working, sleeping, concentrating, and maintaining stamina.

In the within action, the Sixth Circuit concluded that concentrating and maintaining stamina were not major life activities. Although the Court cited this Court's previous opinion in *Bragdon v. Abbott,* 524 U.S. 624 (1998), for the proposition that Petitioner had the duty to show (1) that his impairments affect a major life activity, as the ADA defines a major life activity; and (2) the effect of his impairments is a substantial limitation, as the ADA defines a substantial limitation, it then concluded based on its own past precedent, that thinking and maintaining stamina were not major life activities within the meaning of the ADA. In *Taylor v. Phoenixville School District,* 184 F. 3d 296 (3rd Cir. 1999), the Third Circuit concluded that thinking was in fact a major

life activity. See also, *Nawrot v. CPC International, n/k/a Bestfoods, Inc., 277 F.3d 896* (7th Cir. 2002). Moreover, in *Gonzales v. National Board of Medical Examiners,* 225 F.3d 620 (6th Cir. 2000), the Sixth Circuit itself concluded that reading was a major life activity. The ADA does not define the terms "physical or mental impairment," "substantially limits," or "major life activities," and no agency has been given authority to issue regulations implementing the generally applicable provisions of the ADA. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.C. 2139, 2145 (1999). The Department of Justice, which Congress assigned to write the regulations for Subchapter III of the ADA, defines "physical or mental impairments" as including "specific learning disabilities." 28 C.F.R. Section 36.104 (1999). Moreover, the Department of Justice's regulations further define "major life activities" as including "walking, seeing, hearing, speaking, breathing, learning, and working." *Id.*, Section 36.104(2). This list is merely illustrative and not exhaustive. Given the illustrative nature of major life activities and the willingness of the Sixth Circuit and other courts to consider learning and reading as major life activities, the cognitive act of thinking should not be excluded. See, e.g., *Bartlett v. New York State Board of Law Examiners,* 970 F. Supp. 1094, aff'd, 156 F. 3d 321 (2d Cir. 1998, vacated, 119 S. Ct. 1999 (reading and writing) (fn. 11); *Bercovitch v. Baldwin School, Inc.,* 133 F. 3d 141, 155 (1st Cir. 1998). Moreover, the Petitioner's claim that his anxiety disorder affected his ability to maintain stamina should also be included as a major life activity. This Court has noted that the term "major" in the phrase "major life activities" means important. This Court has also concluded that major life activities refer to those activities that are of central importance to daily life. *Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U.S. 184, 122 S.C. 681(2002). Petitioner submits that the acts of concentration and stamina cut across all aspects of

daily life and should have been considered as major life activities and analyzed accordingly to determine if Petitioner's impairment of an anxiety disorder significantly limited those activities. Because of the case by case nature of claims brought under the Americans with Disabilities Act, clear guidance on the scope of major life activities covered under this statute would provide much needed guidance for counsel and courts.

In the case at bar, the Sixth Circuit also concluded that working and sleeping were in fact major life activities. However, based on the record in the within case, the Sixth Circuit has erroneously concluded that Petitioner did not demonstrate substantial impairment to his sleeping. The Sixth Circuit appears to have relied on its prior precedent in *Swanson vs. University of Cincinnati,* 268 F.3d 307, 316 (6th Cir. 2001). In that action the Court concluded that less than five hours of sleep was not optional, but not significantly restricted in comparison to the average person in the general population. There the Court noted that when the Plaintiff took Paxil and Prozac, the quality of his sleep improved. In the within case, by contrast, a six month period was at issue. Serious sleep problems are documented during this period despite medication which was not prescribed until midway through this period. It is submitted that at the summary judgment stage, Petitioner at least presented a genuine issue of material fact regarding the effect of the anxiety disorder on his sleeping.

In the within action, Petitioner contends that he was substantially limited in the major life activity of sleeping. It is submitted that the Sixth Circuit's denial of Petitioner's contentions that he was substantially limited in the major life activity of sleeping, in the face of Petitioner's medical evidence of a long standing and permanent anxiety disorder

and the involvement of a psychiatrist during the period in contention, clearly demonstrates a substantial limitation. In *Toyota Manufacturing, Kentucky, Inc. v. Williams,* 534 U.S.184, 122 S.C. 681 (2002), this Court warned that the word "substantial" clearly precludes impairments that interfere in only a minor way with the central activities of daily life. Moreover, the impairment's impact must also be permanent or long term. On the record in this case, Petitioner has demonstrated a long term and likely permanent condition with a severe impact on sleep activities noted in medical records.

B. The Court of Appeals erroneously concluded that Petitioner was not substantially limited in the major life activity of working when in fact Petitioner's condition affected his ability to work beyond eight hours in a day despite whatever job in the plant Petitioner might have held.

The Court of Appeals held in part that Petitioner could not show that he was substantially limited in the major life activity of working unless he could show that he was significantly restricted in his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person with comparable training, skills, and abilities. The Court of Appeals noted that the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. Petitioner contends that his disabling condition affected every job in the Respondent's plant. Depositions in the record reveal that Respondent considered that an eight (8) hour per day limitation prevented an employee from performing, not only the forklift job, but also every other job in the plant. At the time at issue, Petitioner had some twenty-six (26) years of seniority with the Respondent and had worked in several other

job capacities. The record shows that Respondent did not consider placing Petitioner in any other job because his daily hour restriction prevented him from working any job in the plant. Thus, Petitioner's impairment did not affect an isolated job. Rather, Petitioner had no other job in the plant to seek out in which he could have been free of the above described impairment.

C. The Court of Appeals erroneously concluded that Petitioner was not disabled within the meaning of the Americans with Disabilities Act without giving consideration to Petitioner's alternative contentions that he fell within statutory protection because of Respondent's perception of or regarding him as disabled.

The Court of Appeals in the within case found that Petitioner was not substantially limited in the major life activities of sleeping and working and, hence, found him not be within the coverage of the Americans with Disabilities Act. The Court of Appeals, in making its analysis of coverage, failed to consider whether Petitioner was perceived of or regarded as disabled by Respondent. Under the Americans with Disabilities Act, "disability" includes "being regarded as having" an impairment that substantially limits one or more of the major life activities. 42 U.S.C. Section 12101(C). This Court has stated that a person is regarded as disabled within the meaning of the ADA if "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that a person's actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139, 2149-50 (1999). The Respondent here had changed its policies to require ADA coverage in order obtain permanent

restrictions. The Respondent referred Petitioner to its ADA administrator and treated Petitioner as if he were covered under the ADA. Then, Respondent denied the restriction during the six month period. In the within case, it is clear that throughout the six month period during which Petitioner was off on leave because he was not accommodated in his request to work only eight hours in a single day, he continuously supplied Respondent with numerous reports and medical records from his treating physician, his psychiatrist, and a clinical therapist. With knowledge of these reports, the Respondent referred Petitioner to an independent psychiatric evaluation the results of which corroborated the diagnoses of Petitioner's medical providers. The independent psychiatrist concluded that the eight hour per day restriction be once again granted and that it was likely that the work restrictions would be permanent, and Petitioner continued to report significant symptoms. Given the records before the Respondent and its subsequent reinstatement of Petitioner's eight hour per day limitation, it is submitted that even if Petitioner did not suffer from a disability within the meaning of the ADA, he was regarded by Respondent as having a disabling condition within the meaning of the act. The Court of Appeals, therefore, had an obligation to analyze Petitioner's claim in light of the regarded as prong of ADA coverage, which it failed to do.

CONCLUSION

For reasons set forth in this Petition for Writ of Certiorari, Petitioner Boerst respectfully requests that a writ issue as prayed for in order to review the aforementioned Sixth Circuit Opinion set forth in Appendix A.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-3281

January 15, 2002, Filed

TERRY R. BOERST,
Plaintiff-Appellant,

v.

GENERAL MILLS OPERATIONS, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio
99-07020
Katz

JUDGES:
BEFORE: NELSON and BATCHELDER, Circuit Judges; FEIKENS *, District Judge.

* The Honorable John Feikens, United States District Court for the Eastern District of Michigan, sitting by designation.

OPINION

ALICE M. BATCHELDER, Circuit Judge. The district court ruled that Terry Boerst ("Boerst") was not disabled under the Americans With Disabilities Act ("ADA") and entered summary judgment against him. We conclude that two of the four activities that Boerst contended qualify as major life activities under the ADA do not qualify; the limitations that Boerst said are substantial limitations under the ADA are not substantial at all; and Boerst conceded that the medication Zoloft alleviated the infirmities about which he complained. We will AFFIRM the district court.

FACTS AND PROCEDURAL BACKGROUND

Boerst sued General Mills under the ADA and Ohio's state-law analogue to the ADA. The gist of Boerst's claim is that between May 14, 1997, and November 10, 1997, General Mills denied him a reasonable accommodation and laid him off because he refused to work more than eight hours in any one day. Boerst is seeking backpay and prospective injunctive relief.

Sometime in late 1996 Boerst began complaining that he was suffering from anxiety, fatigue, difficulty sleeping and an inability to concentrate. He complained that these problems were caused by his worrying about having to come into work early and work more than eight hours a day. He also complained that these troubles were exacerbated by concerns that all of this stress might cause him to relapse into alcoholism.

To remedy Boerst's problems, his doctor recommended that Boerst work no more than eight hours per day. For some period of time (the record does not say how long), General Mills excused Boerst from any overtime and allowed him to work no more than eight hours per day. General Mills viewed the overtime restriction as having lapsed in January 1997, and in May of 1997, General Mills told Boerst that he would again be required to work overtime. The company advised Boerst that because his overtime restriction was not permanent; Boerst needed to (but did not) have his work restriction renewed by his doctor. Faced with the prospect of again working more than eight hours a day and seeing that company officials would not budge, Boerst went on medical leave on May 14, 1997. Immediately upon leaving General Mills. Boerst went straight to his doctor, Dr. Jones.

Dr. Jones gave Boerst a note saying that Boerst should not work more than eight hours in any one day. Boerst took this note back to General Mills and gave it to Glenda Simon, who served as General Mills's administrator for the Family Medical Leave Act and attendance policy. General Mills refused to accept Dr. Jones's recommendation that Boerst work no more than eight hours per day.

Boerst continued to see Dr. Jones about once a week and Dr. Jones continued to give Boerst notes saying that Boerst should have to work no more than eight hours per day. Boerst continued to deliver these notes to General Mills, and General Mills continued to reject the doctor's suggestion. Boerst did not return to work until the third week of July 1997, when General Mills put him back on the work schedule.

Things went fine for Boerst for about two weeks, when General Mills again asked Boerst to work more than eight hours in a day. Again. Boerst refused; he went on medical leave at the end of July 1997. Boerst stayed on medical leave until an independent medical exam ("IME") was done by Dr. Daniels on October 20, 1997. Dr. Daniels examined Boerst and concluded that "it is clear that [Boerst] has developed and [sic] anxiety disorder in response to his work hours, and his interpretations of it . . . It is my recommendations [sic] that his work restriction be granted." The IME report was faxed to General Mills on October 31, 1997. By November 10, 1997, Boerst was back to work, enjoying his daily overtime restriction and sometimes working seven days a week. He works at General Mills today and still enjoys this eight-hour-per-day restriction.

Sometime in August 1997, Boerst began taking the medication Zoloft to alleviate his anxiety and stress. At his deposition. Boerst testified that Zoloft had "pretty much solved all [his] problems." A doctor's report confirms Zoloft's effect: "Mr. Boerst . . . is currently taking Zoloft 100mg . . . and his prognosis is fair."

While Boerst was on medical leave in the fall of 1997, he filed a charge of discrimination with the EEOC. In March 1999, after Boerst was back at work, the EEOC issued a right to sue letter. Boerst then brought this action against General Mills, claiming that General Mills had violated the collective bargaining agreement ("CBA") and discriminated against him in violation of the ADA and Ohio law. He also sued his national and local unions and alleged that his unions failed to adequately address a grievance that Boerst filed about his dispute with General Mills.

After a morning of being deposed by the unions' lawyer, Boerst abandoned his claims against the unions and his claim against General Mills for breach of contract. Boerst pursued only his ADA and Ohio-law claims against General Mills.

General Mills moved for summary judgment, arguing that Boerst was not disabled under either the ADA or Ohio law. General Mills contends that under the law of this circuit, an inability to work more than eight hours a day is not a substantial limitation for purposes of the ADA. General Mills stressed that according to Boerst's doctor and Boerst's deposition testimony, the medication Zoloft had mitigated whatever infirmities Boerst suffered.

Boerst filed an affidavit opposing General Mills's motion for summary judgment that tried to undo his deposition testimony about the mitigating effects of Zoloft:

> [B]eginning in mid-1996, anxiety and resulting loss of sleep and fatigue caused by my concerns over forced overtime affected my ability to perform my forklift operator's job, leading me to seek medical assistance and a restriction against overtime in excess of eight hours per day to safeguard my concentration, stamina and attentiveness on the job of forklift operator. My concentration, stamina and attentiveness on the job were particularly affected on the days following sleep disturbances triggered by overtime anxiety.

The district court concluded that Boerst's affidavit did nothing to undermine Boerst's deposition testimony that Zoloft had pretty much solved all of his problems, and the court granted General Mills's motion for summary judgment. The district court held that Boerst had failed to show that he suffered a substantial limitation on any major life activity. The court explained that Boerst was not substantially limited in other major life activities because Zoloft allowed Boerst to perform his job duties, and an eight-hour-per-day work restriction cannot establish a disability under the ADA.

Boerst filed a timely notice of appeal. On appeal, Boerst identifies three impairments: stress, anxiety and fatigue. He says that these impairments substantially limit four activities that qualify as major life activities under the ADA: concentrating, maintaining stamina, sleeping and working. He contends that the district court erred because genuine issues of material fact remain about whether his impairments substantially limit any major life activity.

DISCUSSION

Boerst's pleadings make clear that he proceeds under 42 U.S.C. §12102(2)(A).[1] Consequently, Boerst must present evidence from which a factfinder could find that he suffers from a condition that causes a substantial limitation on some

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[1] Our ADA analysis applies equally to Boerst's Ohio-law claim. *See Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n*, 66 Ohio St. 2d 192, 421 N.E. 2d 128, 131 (Ohio 1981) (Federal case law applying Title VII is generally applicable to cases involving Ohio Rev. Code Chapter 4112); *Wooten v. City of Columbus*, 91 Ohio App. 3d 326, 632 N.E. 2d 605, 611 (Ohio Ct. App. 1993) (same).

major life activity. *See Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 598 (6th Cir. 1999) (ADA plaintiff must show "the existence of an impairment that substantially limits a major life activity.").

Under *Doren*, Boerst must show that: (1) his impairments affect a major life activity, as the ADA defines major life activity; and (2) the effect of his impairments is a substantial limitation, as the ADA defines substantial limitation. *See Bragdon v. Abbott*, 524 U.S. 624, 631, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998). Sleeping and working are major life activities under the ADA. Concentrating and maintaining stamina are not. *See Doren*, 187 F.3d at 597 ("Under the Act, working qualifies as a 'major life activity.'"); *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999) ("We hold that sleeping is a major ~~life~~ activity, but concentration is not.").[2]

Because neither concentrating nor maintaining stamina qualify as major life activities under the ADA, only sleeping and working concern us in this appeal. We must decide whether the district court correctly concluded that Boerst did not show that he could carry his burden at trial to prove that he suffered a substantial limitation on his ability to either sleep or work.

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[2] *See also Linser v. State of Ohio, Dep't of Mental Health*, No. 00-3281, 234 F.3d 1268, 2000 U.S. App. LEXIS 35211, 2000 WL 1529809, at *3 (6th Cir. Oct. 6, 2000); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2nd Cir. 1998) ("Sleep . . . is undoubtedly a major life activity[.]").

Boerst cannot show that he is substantially limited in a major life activity unless he can show either: (1) he cannot perform a major life activity that an average person can perform; or (2) his performance of a major life activity is significantly restricted in the condition, manner, or duration when compared to an average person. *See* 29 C.F.R. §1630.2(j)(1). In determining whether either of these two showings are made, we ask about the nature and severity of the impairment that purports to substantially limit the major life activity. *See* 29 C.F.R. §1630.2(j)(2)(i).

Boerst cannot show that he is substantially limited in the major life activity of working, unless he can show that he is "significantly restricted in ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person with comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i); *McKay v. Toyota Motor Mfg., USA, Inc.*, 110 F.3d 369, 372 (6th Cir. 1997).

When determining if an ADA plaintiff suffers a substantial limitation, we must consider any corrective measures that the plaintiff has employed. *Sutton v. United Airlines, Inc.*, 527 U.S. 482, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999) ("Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures--both positive and negative--must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act.") If the corrective measures sufficiently alleviate

plaintiff's impairment, then the plaintiff is not disabled under the ADA because the plaintiff's impairment does not rise to a substantial limitation. 527 U.S. at 482-83. For example, if the plaintiff suffers from high blood pressure and takes medication which relieves the high blood pressure to the extent that the plaintiff no longer suffers a substantial limitation, the plaintiff is not disabled under the ADA. *See Murphy v. United Parcel Serv.*, 527 U.S. 516, 521-22, 144 L. Ed. 2d 484, 119 S. Ct. 2133 (1999).

Boerst tries to establish that he suffers a substantial limitation on his ability to sleep. To that end. Boerst offered allegations and supporting evidence which mirror those offered and rejected in *Pack* and *Linser*. For example. Boerst put in evidence that he could "only get two-four hours" sleep a night. So did the plaintiff in *Pack*. Getting between two and four hours of sleep a night, while inconvenient, simply lacks the kind of severity we require of an ailment before we will say that the ailment qualifies as a substantial limitation under the ADA. *See Linser v. State of Ohio, Dep't of Mental Health*, No. 00-3281, 234 F.3d 1268, 2000 U.S. App. LEXIS 35211, 2000 WL 1529809, at *3. Consequently, we conclude that so far as the major life activity of sleeping goes, Boerst failed to show on summary judgment that he could prove a substantial limitation. The district court made no error when it entered summary judgment against Boerst on this point.

Boerst says that he suffers a substantial limitation on his ability to work because he can work no more than eight hours a day. Like Boerst's allegation and evidence about sleepless nights, this allegation and its supporting evidence cannot show a substantial limitation under the ADA. *See Linser*, 234 F.3d 1268, 2000 U.S. App. LEXIS 35211, 2000

WL 1529809, at *3 ("We are bound by the Sixth Circuit precedent holding that the inability to work in excess of eight hours per day does not constitute a disability.") (citing *Doren, 187 F.3d at 599*). Boerst also does not show that his professed inability to work more than eight hours a day means that he is precluded from performing a broad class of jobs. These reasons alone convince us that the district court was quite correct when it granted summary judgment for General Mills on this issue. But the district court was correct for another reason as well.

Moving for summary judgment. General Mills pointed out that Boerst conceded that since he started taking Zoloft–a medication to help alleviate stress--and that Zoloft had "pretty much solved all" of his problems. Boerst counters by declaring that even after taking Zoloft, he still could sleep no more than two to four hours per night. But as the district court pointed out, the affidavits that Boerst submitted "provide no evidence to dispute the mitigating effects of" Zoloft. As we have heretofore held, Boerst's claimed sleep difficulties do not rise to the level of a disability under the ADA. Boerst's own testimony shows that he suffered no substantial limitation on his ability to work when Zoloft's mitigating effects are taken into account. Therefore, under *Sutton* and *Murphy*, we affirm the district court's conclusion that Boerst has not presented evidence that he is substantially limited in his ability to work. Moreover, the fact that Boerst was not taking Zoloft for part of the time relevant to this case does not suffice to demonstrate that he was under a disability during that time for purposes of the ADA.

Consequently, we AFFIRM the final summary judgment order entered against Boerst because Boerst failed

to demonstrate on summary judgment his ability to prove at trial that he is disabled within the meaning of the ADA.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:99 CV 7020

[Filed January 31, 2000]

Terry R. Boerst,	)
Plaintiff,	)
	)
v.	)
	)
General Mills Operations, Inc., at al.	)
Defendant.	)
	)

JUDGMENT ENTRY

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment (Doc. No. 38) is granted.

/s/_____
DAVID A. KATZ
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:99 CV 7020

[Filed January 31, 2000]

Terry R. Boerst, Plaintiff,	)
v.	)
General Mills Operations, Inc., et al., Defendant.	)

MEMORANDUM OPINION

KATZ, J.

This matter is before the Court on Defendant General Mills' Motion for Summary Judgment, Plaintiffs opposition, and Defendant's reply thereto. Jurisdiction of the Court is pursuant to 28 U.S.C. §1331. For the reasons that follow, the Court finds Defendant's Motion is well taken.

BACKGROUND

Terry R. Boerst ("Boerst") is an hourly employee of General Mills Operation, Inc. ("General Mills") and has been employed in that capacity since 1971. At all times relevant to this dispute, Boerst's position with General Mills was that of a forklift operator. Plaintiff was diagnosed with stress

disorder, anxiety and depression. He obtained a medical restriction which prohibited him from working more than eight hours in a work day. It is undisputed that General Mills honored the medical restriction until May 14, 1997. At that time, due to General Mills' refusal to accommodate the medical restriction, Boerst was laid off. On November 10, 1997, General Mills again honored the medical request and Boerst returned to work and has continued to work under the medical restriction.

Boerst initiated this suit[1] against General Mills, alleging violations under the American With Disabilities Act, 42 U.S.C. §12101 *et seq.* and Ohio Rev. Code §4112.022. General Mills moves for summary judgment on the basis that Plaintiff is not disabled and not entitled to protection under the statute.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standard

As an initial matter, the Court sets forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

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[1] Initially Plaintiff also named as Defendants the American Federation of Grain Millers and American Federal of Grain Millers-Local 58 for breach of the collective bargaining agreement and a breach of the duty of fair representation under the LMRA, 29 U.S.C. §185. Those claims, however, were dismissed on July 30, 1999, with prejudice. (Doc. No. 28.)

which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S, 317, 322 (1986). Of course, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. 477 U.S. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) *(quoting* Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S. at 324. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

B. The American with Disabilities Act

Federal law, as embodied in the Americans With Disabilities Act ("ADA"), prohibits a covered employer from

"discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to... the hiring, advancement, or discharge of employees... and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a)[2]. A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). An employer cannot discriminate against a qualified employee with a disability by not making reasonable accommodations, which accommodations for that employee's known limitations do not impose an undue hardship on the operation of the employer's

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[2] It is unlawful in Ohio "[f]or any employer, because of the... disability...of any person...to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Ohio Rev. Code §4112.02(A). The Ohio Supreme Court has held that the coverage of §4112.02(A) is identical to the coverage of federal law prohibiting discrimination in the employment context. Thus, evidence sufficient to support a finding of discrimination under Title VII of the Civil Rights Act of 1964 is necessary before a violation of §4112.02(A) can be shown. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n,* 66 Ohio St. 2d 192, 196, 421 N.E.2d 128, 131 (1981); *see also Little Forest Medical Ctr. of Akron v. Ohio Ciwl Rights Comm'n*, 61 Ohio St. 3d 607, 609-10, 575 N.E.2d 1164, 1167 (1991), *cert. denied,* 503 U.S. 906 112 S. Ct. 1263, 117 L.Ed. 2d 491 (1992); *El GrandeSteak House v. Ohio Civil Rights Comm'n*, 99 0hio App. 3d 557, 562, 651 N.E.2d 440, 444 (1994); *Twinsburg City Schools v. Ohio Civil Rights Comm'n.* 86 Ohio App. 3d 527, 529, 621 N.E.2d 591, 593 (1993). Accordingly, the Court will address Plaintiffs federal law and state law claims together.

business. 42 U.S.C. §12112(a) & (b)(5)(A).

In order to establish a *prima facie* case of disability discrimination in the employment context, a plaintiff must allege and prove (1) that he is an individual with a disability; (2) that he is otherwise qualified for the position he seeks or holds; and (3) that he was excluded from the position under circumstances that raise a reasonable inference of unlawful discrimination. *See Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 441 (6th Cir. 1991) (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L. Ed. 2d 980 (1979); *Ennis v. National Ass'n of Business & Educ. Radio., Inc.*, 53 F.3d 55, 58 (4th Cir. 1995). When the plaintiff has established *a prima facie* case of discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its decision. *McDonell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). Once the employer meets its burden, the burden shifts back to the plaintiff to prove that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981);*see also Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1095 (6th Cir. 1996); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990).

1. Is the Plaintiff an Individual With a Disability?

The first question is whether Plaintiff has shown that he is an individual with a disability; *i.e.*, that he (A) has a physical or mental impairment that substantially limits one or more of his major life activities, (B) has a record of such an

impairment, or (C) is regarded as having such an impairment. *See* 42 U.S.C. §12102(2).

It is clear from the record that Plaintiff had, at all times pertinent to this suit, an actual physical impairment within the meaning of the Act. *See* 29 C.F.R. §1630.2(h)(1). The parties disagree about whether a reasonable jury could find that Plaintiff's physical impairment substantially limited one or more of his major life activities. "Major life activities" includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. " 29 C.F.R. §1630.2(i). In determining whether an individual is substantially limited in a major life activity, the Court considers:

> (i) The nature and severity of the impairment;
> (ii) The duration or expected duration of the impairment; and
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. §1630.2(j)(2).

The burden is upon a plaintiff to demonstrate the existence of an impairment that substantially limits a major life activity as an element of the prima facie case. *Doren v. Battle Creek Health System*, 187 F.3d 595 (1999). In this instance, the Plaintiff asserts that he is substantially limited in the major life activities of the ability to sleep, concentrate, maintain stamina and work. There is no dispute that Plaintiff

was diagnosed with anxiety disorder in 1996 and has taken the prescription medication Zoloft continuously since August, 1997. An independent evaluation corroborated the differential diagnoses and recommended that the work hour restrictions be continued. Since that time, his anxiety disorder and depression has been under control contingent upon the restriction of an 8 hour work day. The Plaintiff testified that at all times during an eight hour work day he was able to perfom the essential functions of his position. (Boerst Dep., p. 95.)

The Supreme Court in *Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139 (1999), considered whether two candidates, because of their severe myopic condition, were discriminated against by the airline when their condition was capable of correction through other measures:

> A person whose physical or mental impaiment is corrected by medication or other measures does not have an impairment that presently "substantially limits" a major life activity. To be sure, a person whose physical or mental impaiment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not "substantially limi[t]" a major life activity.

See also Murphy v. UPS, 119 S.Ct. 2133 (1999) (track driver with high blood pressure who took medication for hypertension was not substantially limited in any major life activity under the ADA.

In this case, there is no evidence that Plaintiff is unable to perform his job duties and work an eight hour work day as long as he takes his medication. His deposition testimony is that as long as he takes the medication, he has little if any problems. The affidavit testimony of both Plaintiff and his wife provide no evidence to dispute the mitigating effects of the prescribed medication.

Plaintiff argues that the significant nature of his sleep disturbance, poor concentration and fatigue supports his claim that he is disabled. In addition, he contends that the medical evidence all attests to the fact that his condition is permanent and supports a finding that Plaintiff's major life activities are "substantially limited." This Court disagrees. While there is no doubt that Plaintiff suffers from an impairment which affects those major life activities, a reasonable jury could not find that he is substantially limited in the major life activity of working given that his condition is mitigated by medication. *Sutton, supra.*

Furthermore, Plaintiff's medical restriction of an eight hour work day is also insufficient to establish his disability under the ADA. Without more, courts considering these time restrictions have found that there was no significant restriction on the ability to work. *Tardie v. Rehabilitation Hosp. Of Rhode Island,* 168 F.3d 538, 541 (1st Cir. 1999) (involving an employee who was limited to a 40 hour work week); *Roth v. Lutheran General Hosp.,* 57 F.3d 1446 (7th Cir. 1995) (involving doctor with a visual impairment which prevented him from working more than 8 or 10 hours); *Rutlin v. Prime Succession, Inc.,* 75 F.Supp.2d 735 (W.D. Mich 1999) (40 hour week work restriction insufficient to substantially limit the major life activity of working); *Shpargel v. Stage & Co.,*

914 F.Supp. 1468, 1474 (E.D. Mich. 1996).

In addition, Plaintiff's assertions that he is substantially limited in the major life activities of sleeping, concentrating and maintaining stamina are not substantiated by the record in this case. The independent evaluation, while noting Plaintiff's report of sleep disruptions, concludes as follows:

> It is my recommendation that his work restrictions be granted. It is likely that the restrictions will be permanent, given that the cognitive interpretation of his overtime will likely continue, and will produce the secondary anxiety symptoms. The antidepressant he has been prescribed is often used for depression, coupled with anxiety. Sometimes the medications treat the symptoms, but it does not cure the problem. Although he continues to report symptoms, *they would not prevent him from returning to a restricted work day,* and as mentioned above, there is no evidence to support a potential for violence.

(Pltfs. Ex. 5, p. 20) (Emphasis added.) Based upon Plaintiff's medical evidence and considering this evidence in a light most favorable to the nonmovant, a reasonable jury could not find he was disabled in the major life activities of sleeping, concentrating, or maintaining stamina as the medication taken for his symptoms allows him to perform his job duties.

Moreover, there is no evidence which establishes that he was regarded by the Defendant as having a disability. Recognition of an impairment alone does not rise to the level of a disability under the ADA. *Shpargel v. Stage & Co., supra.* An employer's request for an independent medical examination does not equate to an employer "regarding" an employee as disabled. *Sullivan v. River Valley School Dist.,* 197 F.3d 804, 810-811 (6th Cir. 1999). In this case, Defendant's request for an independent evaluation of the Plaintiff is insufficient to establish that the employer "regarded" Plaintiff as disabled. As the Plaintiff has failed to establish that he is a disabled individual under the ADA, the Defendant is entitled to summary judgment on this issue.

2. Performing the Essential Functions of the Job

Assuming *arguendo* that the Plaintiff had established that he is disabled individual, the Defendant contends that he is unable to perform the essential functions of his job. A qualified individual with a disability under ADA is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). Plaintiff is qualified if, and only if, he can perform the essential functions of his job. The Court must give some deference to the employer's judgment in determining what functions of a job are essential. *Id.* Other factors which may be considered include the work experience of others, both in the past and present, who have held the same position. *Brichers v. Cleveland Bd. Of Educ.,* 145 F.3d 846, 849 (6th Cir. 1998).

The Job Demands/Task Analysis relative to Plaintiffs job identifies a number of factors necessary to his position. Under the category of work environment, the position of line support (cake) requires working alone, working without direct supervision, long work hours required, and indicates that a work week over 40 hours, as well as a rotating shift. (Plts Ex. l.)

The over time assignments are also dictated by the collective bargaining agreement ("CBA"). When overtime is required after the employee's normally scheduled shift, the first worker responsible to work the overtime is the employee on the job who worked the preceding shift. Overtime that is scheduled prior to the shift commencing is assigned to the person with the least number of hours in that department. (Olsen Dep., pp. 27-28.)

The evidence in the record reflects that the long work hours are described in Plaintiffs job classification and are also impacted by the CBA. An employer may not restructure a job in a manner which would undermine the legitimate rights of other employees relative to a CBA. *Foreman v. Babcock & Wilcox Co.,* 117 F.3d 800, 810 (5th Cir. 1997); Bensen v. *Northwest Airlines, Inc.,* 62 F.3d 1108, l 114 (8th Cir. 1995); *Jasany v. U.S. Postal Service,* 755 F.2d 1244, I251-1251 (6th Cir. 1985) (determined under the Rehabilitation Act of 1974) A person who cannot perform the essential functions of his position may not be an "otherwise qualified individual with a disability." *Kiphart v. Saturn Corp.,* 74 F.Supp.2d 769 (M.D. Tenn. 1999). Because the Plaintiff indicates that he is unable to work over eight hours a day due to his impairment, he is unable to perform the essential functions of his job and, thus, the Defendant's motion for summary judgment would be

granted on that basis.

CONCLUSION

As the Plaintiff has failed to establish a prima facie case under the ADA, the Court finds that Defendant's Motion for Summary Judgment (Doc. No. 38) is granted.

IT IS SO ORDERED

/s/_____.
DAVID A. KATZ
U.S. DISTRICT JUDGE

APPENDIX C

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 USCS §12101 (2002)

§12101. Congressional findings and purposes

(a) Findings. The Congress finds that–

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age,

individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose.
It is the purpose of this chapter–

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub. L. 101-336, Sec.2, July 26, 1990, 104 Stat. 328.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original "this Act", meaning Pub. L. 101-336, July 26, 1990, 104

Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

SHORT TITLE

Section 1(a) of Pub. L. 101-336 provided that: "This Act (enacting this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, amending section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47, and enacting provisions set out as notes under sections 12111, 12131, 12141, 12161, and 12181 of this title) may be cited as the 'Americans with Disabilities Act of 1990'."

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

42 USCS §12111 (2002)

§12111. Definitions

As used in this title:

(1) Commission.

The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) Covered entity.

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat.

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee.

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer.

(A) In general.

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions.

The term "employer" does not include–

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) Illegal use of drugs.

(A) In general.

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs.

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 USCS §812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) Qualified individual with a disability.

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation.

The term "reasonable accommodation" may include–

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship.
(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include–

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to

the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(Pub. L. 101-336, title I, Sec. 101, July 26, 1990, 104 Stat. 330; Pub. L. 102-166, title I, Sec. 109(a), Nov. 21, 1991, 105 Stat. 1077.)

REFERENCES IN TEXT

The effective date of this subchapter, referred to in par. (5)(A), is 24 months after July 26, 1990, see section 108 of Pub. L. 101-336, set out as an Effective Date note below.

The Controlled Substances, Act referred to in par. (6)(A), is title II of Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (Sec. 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

This chapter, referred to in par. (10)(B)(i), was in the original "this Act", meaning Pub. L. 101-336, Jul 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

AMENDMENTS

1991 - Par. (4). Pub. L. 102-166 inapplicable to conduct occurring before Nov. 21, 1991, see section 109(c) of Pub. L. 102-166, set out as a note under section 2000e of this title.

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102-166 inapplicable to conduct occurring before Nov. 21, 1991, see section 109(c) of Pub. L. 102-166, set out as a not under section 2000e of this title.

EFFECTIVE DATE

Section 108 of title I of Pub. L. 101-336 provided that: "This title (enacting this subchapter) shall become effective 24 months after the date of enactment (July 26, 19900."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 5057, 12581, 12594, 12635 of this title.

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

SUBCHAPTER I - EMPLOYMENT

42 USCS §12112 (2002)

§12112. Discrimination

(a) General rule.

No coveed entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction.

As used in subsection (a), the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship

includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an

individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries.

(1) In general.

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation.

(A) Presumption.

If an employer controls a corporation whose place of

incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception.

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination.

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control,
of the employer and the corporation.

(d) Medical examinations and inquiries.

(1) In general.

The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry.

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry.

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination.

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if–

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry.

(A) Prohibited examinations and inquiries.

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries.

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement.
Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to

the requirements of subparagraphs (B) and (C) of paragraph (3).

(Pub. L. 101-336, title I, Sec. 102, July 26, 1990, 104 Stat. 331; Pub. L. 102-166, title I, Sec. 109(b)(2), Nov. 21, 1991, 105 Stat. 1077.)

AMENDMENTS

1991 - Subsecs. (c), (d). Pub. L. 102-166 added subsec. (c) and redesignated former subsec (c) as (d).

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102-166 inapplicable to conduct occurring before Nov, 21, 1991, see section 109(c) of Pub. L. 102-166 set out as a note under section 2000e of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1981a, 12209 of this title; title 2 sections 1202, 1311; title 3 section 411.

APPENDIX D

TITLE XLI [41] LABOR AND INDUSTRY

CHAPTER 4112: CIVIL RIGHTS COMMISSION

§4112.02 Unlawful discriminatory practices.

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

TITLE XLI [41] LABOR AND INDUSTRY

CHAPTER 4112: CIVIL RIGHTS COMMISSION

§4112.99 Civil remedies for violation.

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:99 CV 7020

[Filed April 23, 1999]

Terry R. Boerst
14997 Todd Road
Petersburg, Michigan 49270
Plaintiff

v.

General Mills Operations, Inc.
c/o C.T. Corporation System,
Statutory Agent
815 Superior Avenue Northeast
Cleveland, Ohio 44114

and

American Federation of Grain Millers,
(AFL-CIO, CLC)
4949 Olson Memorial Highway
Minneapolis, Minnesota 55422-5199

and

American Federation of Grain Millers
(AFL-CIO, CLC) - Local 55
One Maritime Plaza
Toledo, Ohio 43604

Defendants

FIRST AMENDED COMPLAINT
JURY DEMAND ENDORSED HEREON

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331. This is a suit for breach of duty of fair representation against the Defendants, American Federation of Grain Millers and American Federation of Grain Millers - Local 58, hereinafter "Defendant Unions", pursuant to 29 U.S.C. §151 and this suit also involves a claim of breach of Collective Bargaining Agreement against Defendant, General Mills, hereinafter "Defendant Company", pursuant to 29 U.S.C. §185(a) known as section 301 of the Labor Management Relations Act. This suit is commonly referred to as a "hybrid 301 suit".

2. Plaintiff also invokes the jurisdiction of this Court pursuant to 42 U.S.C. sec. 12101 et seq. known as the Americans with Disabilities Act and the enforcement mechanisms for that act contained in 42 U.S.C. sec. 2000e *et seq.* Said act provides for injunctive relief and damages for discrimination in employment against qualified persons with disabilities. On or about October 9, 1997, plaintiff filed a charge of employment discrimination on the basis of disability

with the United States Equal Employment Opportunity Commission, charge number 220-98-0256. See Exhibit "A". On or after March 4, 1999, plaintiff received a Notice of Right to Sue issued by the EEOC advising him of this right to file suit under the Americans with Disabilities Act within ninety (90) days of his receipt of said notice. See Exhibit "B".

3. Plaintiff also invokes this Court's supplemental jurisdiction pursuant to 28 U.S.C. sec. 1367 over Ohio statutory and common law claims.

NATURE OF THE CASE

4. Plaintiff brings claims that the Defendant Company breached the Collective Bargaining Agreement when it failed to make reasonable accommodations for Plaintiff's disability as provided in §1.02-2. Plaintiff states that Defendant Unions failed to process his grievance and improperly declined to take said grievance to arbitration. Plaintiff further alleges that the conduct of the defendant company violated the Americans with Disabilities and Chapter 4112 of the Ohio Revised Code as related to handicap discrimination. Plaintiff contends that the conduct of the defendant unions violated Chapter 4112 of the Ohio Revised Code as related to handicap discrimination.

PARTIES

5. Plaintiff Terry R. Boerst is a white male citizen of the City of Petersburg, County of Monroe, State of Michigan. Plaintiff contends that he was refused

accommodations for his disability from May 14, 1997 until November 10, 1997.

6. Defendant, General Mills, produces numerous products throughout the United States and is engaged in an industry affecting commerce. At all times material hereto, said Defendant Company was and currently is Plaintiff's employer.

7. Defendants American Federation of Grain Millers and American Federation of Grain Millers - Local 58 are labor organizations certified as the sole and exclusive collective bargaining agents for certain General Mills Corporation Employees among other corporations.

FIRST CLAIM FOR RELIEF
Breach of Labor Contract

8. Plaintiff incorporates each and every allegation contained in paragraph one (1) through seven (7) by reference in its entirety as if fully restated herein.

9. In late 1996, Plaintiff was diagnosed with stress disorder and restricted by his physician to eight (8) hour work days. At this time, Defendant Company acknowledged and supported the physician's order. However, on May 14, 1997, Defendant Company refused to continue reasonable accommodations for Plaintiff's disability. Defendant Company stated that the physician's order had lapsed in January, 1997, five months prior to Defendant Company's demand that Plaintiff work beyond the eight (8) hours prescribed by his physician. However, there was no corroborating documentation to support Defendant Company's

contention that a time limit had been placed on Plaintiff's eight (8) hour per day work restriction. Defendant further stated that based on its refusal, Plaintiff would be unable to return to work. Throughout Defendant Company's refusal to accommodate Plaintiff's disability (May 14, 1997 to November 10, 1997), Plaintiff received multiple physicians' evaluations that Plaintiff suffers from a stress related disorder that requires an eight (8) hour work day restriction. All of this information was forwarded on to Defendant Company and yet Plaintiff was still unable to return to work until November 10, 1997, thus forcing Plaintiff to miss nearly six (6) months. Plaintiff then filed Grievance No. 438-3. Plaintiff states that Defendant Company discriminated against him based on their refusal to accommodate his disability from May 14, 1997 through November 10, 1997 which is in direct violation with the Collective Bargaining Agreement §1.02-2.

10. As a direct and proximate result of the acts complained of, Plaintiff has suffered lost wages, great mental and emotional stress, anguish, humiliation and embarrassment.

SECOND CLAIM FOR RELIEF
Breach of Duty of Fair Representation

11. Plaintiff incorporates each and every allegation contained in paragraph one (1) through ten (10) by reference in its entirety as if fully restated herein.

12. On or about July 30, 1997, Plaintiff grieved the action of the Defendant Company complained of, *supra*, pursuant to the applicable Collective Bargaining Agreement. On or after July 13, 1998, Plaintiff learned that Defendant

Unions refused to take his case to arbitration. Plaintiff states that the actions of Defendant Unions, by and through its officers and representatives, constitutes an improper failure to pursue his claims to arbitration after having earlier filed for arbitration. Plaintiff states that the Defendant Unions engaged in a course of conduct which was arbitrary and without rational basis in fact and which was taken without reason or cause. Such conduct of the Defendant Unions went so far beyond their wide range of reasonableness as to be wholly irrational and/or devoid of any rational basis in fact. Defendant Unions have breached their statutory duty of fair representation pursuant to 29 U.S.C. §§151 *et seq.*.

13. As a direct and proximate result of the acts complained of, Plaintiff has suffered lost wages, great mental and emotional stress, anguish, humiliation and embarrassment.

THIRD CLAIM FOR RELIEF
Americans with Disabilities Act

14. Plaintiff incorporates each and every allegation contained in paragraphs one (1) through thirteen (13) of this complaint by reference in its entirety as if fully restated herein.

15. Plaintiff alleges that refusal of Defendant General Mills Operations, Inc. to accommodate his disability, as described *supra.*, from May 14, 1997 through November 10, 1997 violates the requirements stipulated under the Americans with Disabilities Act, 42 U.S.C. sec. 12101 *et seq.* Plaintiff states that said violation was willfu.

16. As a direct and proximate result of the acts complained of, Plaintiff has suffered lost wages, great mental and emotional stress, anguish, humiliation and embarrassment.

FOURTH CLAIM FOR RELIEF
OHIO REVISED CODE §4112.022

17. Plaintiff incorporates each and every allegation contained in paragraphs one (1) through sixteen (16) of this complaint by reference in its entirety as if fully restated herein.

18. Plaintiff states that Defendant, General Mills Operations, Inc. has unlawfully discriminated against him on the basis of his handicap in violation of Ohio Revised Code Sections 4112.02(A), made actionable pursuant to Ohio Revised Code Section 4112.99. Plaintiff was and is a handicapped person within the meaning of Ohio Revised Code Section 4112.01(A)(13).

19. As a direct and proximate result of the acts complained of, Plaintiff has suffered lost wages, great mental and emotional stress, anguish, humiliation and embarrassment.

WHEREFORE, Plaintiff respectfully prays for an injunction against further discrimination practiced by Defendant, General Mills Operations, Inc.. Plaintiff further demands judgment against Defendants for lost back wages and for compensatory damages, plus his costs and reasonable attorney fees and whatever other relief, legal or equitable to which he may appear to be entitled.

Respectfully submitted,

WASSERMAN, BRYAN, LANDRY & HONOLD

/s/_____
Francis I. Landry, Attorney for Plaintiff, Terry R. Boerst

JURY DEMAND

Plaintiff demands a jury trial as to all issues so triable in the within cause.

/s/_____
Francis J. Landry

First Amended Complaint - 04/23/99

EXHIBIT A

CHARGE OF DISCRIMINATION

Michigan Department of Civil Rights and EEOC.

Mr. Terry R. Boerst (313) 854-2003
14987 Todd Road
Petersburg, MI 49270 DOB: 12/04/42

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME

General Mills Cat D (501+) (419) 470-7992
1280 Laskey Road
Toledo, OH 43612
County 095

CAUSE OF DISCRIMINATION BASED ON

__X__ Disability

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
05/14/97	09/29/97

__X__ CONTINUING ACTION

THE PARTICULARS ARE

I began employment with the above cited company in August of 1971. My classification is Support Driver. I am an individual with a disability.

On May 14, 1997, I became aware of the fact that my employer has topped honoring my 8 hours per day work restriction. Presently, I'm on a medical leave of absence because my employer will not accommodate my most recent, September 29, 1997 restriction notice.

I believe that I'm being denied reasonable accommodation because of my disability in violation of the American with Disabilities Act of 1990.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 10/9/97 /s/_____
Terry R. Boerst

Signature of Complainant

/s/_____
Terry R. Boerst

Subscribed and Sworn to before me this date
9/10/97 /s/_____
Brenda Stowers

First Amended Complaint - 04/23/99

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Detroit District Office

477 Michigan Ave., Room 865
Detroit, MI 48226-9704
PH: (313) 226-4600
TDD: (313) 226-7599
FAX: (313) 226-4610

Terry R. Boerst vs.
General Mills

Mr. Terry R. Boerst
14987 Todd Road
Petersburg, MI 49270

Dear Mr. Boerst:

The above cited charge that you submitted alleging employment discrimination, in violation of The Americans With Disabilities Act of 1990, as amended, has been transferred to the Equal Employment Opportunity Commission office in Cleveland, Ohio for processing. The address is as follows:

Cleveland District Office
1660 West Second Street
Suite 850
Cleveland, Ohio 44113-1454
(216) 522-2001

If we may be of further assistance, please feel free to call me at (313) 226-7636.

Sincerely,

/s/ _____

Brenda Stowers
Coordinator
Charge Receipts
Technical Information Unit

ACKNOWLEDGEMENT BY CHARGING PARTY OF RECEIPT OF INFORMATIONAL BROCHURES

I hereby acknowledge that a representative of the Detroit District Office of the U.S. Equal Employment Opportunity Commission has provided me with a copy of each of the following:

__X__ Rights and Responsibilities Information for Potential Charging Parties

__X__ Informational Packet regarding Alternate Dispute Resolution, including the form "Charging Party Decision to Select or Decline Opportunity to Mediation"

__X__ Charge of Employment Discrimination

__X__ Medical Authorization Release (for ADA only)

__X__ Photocopy of this form

I also acknowledge that any questions which I may have raised during this interview were answered to my satisfaction by the Intake Officer and/or another staff member of the Detroit District Office. I have been informed that any further questions may be addressed by calling (313) 226-7636.

/s/ Terry R. Boerst _____ 10-9-97

Signature of Charging Party Date

/s/ Brenda Stowers
Signature of Commission Representative

10-9-97
Date

EXHIBIT B

Envelope

CERTIFIED MAIL
Z 166 458 731

U.S. Equal Employment Opportunity Commission
Cleveland District Office
Tower City - Skylight Office Tower
1660 West Second Street - Suite 850
Cleveland, OH 44113-1454

Terry R. Boerst
14987 Todd Road
Petersburg, MI 49270

3/4 First Notice
3/9 Second Notice
3/19

Received 3-4-99

FILING SUIT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OR THE AMERICANS WITH DISABILITIES ACT

PRIVATE SUIT RIGHTS:

This issuance of this Notice of Right to Sue ends EEOC's process with respect to your charge. You may file a lawsuit against the respondent named in your charge within 90 days from the date you receive this Notice. Therefore you should **keep a record of this date**. Once this 90-day period is over, your right to sue is lost. If you intend to consult an attorney, you should do so as soon as possible. Furthermore, in order to avoid any question that you did not act in a timely manner, if you intend to sue on your own behalf, your suit should be filed **well in advance of the expiration of the 90-day period**.

Your lawsuit must be filed in U.S. District Court. Filing this Notice is not sufficient. A court complaint must contain a short statement of the facts of your case which shows that you are entitled to relief. Generally, suits are brought in the state where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office.

You may contact EEOC if you have any questions about your rights, including advice on which U.S. District Court can hear your case, or if you need to inspect and copy information contained in the case file. (Additionally, many EEOC offices can provide you with names of private attorneys who have agreed to consider referrals for private litigation.)

ATTORNEY REPRESENTATION:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, at its discretion, assist you in obtaining a lawyer, if you plan to ask the U.S. District Court to help you obtain a lawyer, you must make this request of the court in the form and manner it requires. Your request to the U.S. District Court should be made well before the end of the 90-day period mentioned above. A request for representation does not relieve you of the obligation to file a lawsuit within this 90-day period.

DESTRUCTION OF FILE:

If you file suit, you or your attorney should forward a copy of your court complaint to the office where you filed your charge within 10 days after you file suit. Your file will be preserved. Generally, EEOC's rules call for your charge file to be destroyed six months from now (one year in the case of charges dismissed for no jurisdiction) unless you have notified us that you have filed suit in U.S. District Court.

IF YOU FILE SUIT, YOU OR YOUR ATTORNEY SHOULD NOTIFY THIS OFFICE WHEN THE LAWSUIT IS RESOLVED.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:99CV7020

[Filed May 19, 1999]

Terry R. Boerst,
Plaintiff,

v.

General Mills Operations, Inc., et al.,
Defendants.

ANSWER OF GENERAL MILLS, INC. TO FIRST AMENDED COMPLAINT

With respect to the allegations in the complaint numbered below, defendant General Mills, Inc. ("General Mills") incorrectly referred to as General Mills Operations, Inc., responds as follows:

1. General Mills acknowledges the existence of the statutes identified in paragraph 1 but denies any liability thereunder.

2. General Mills acknowledges the existence of the statutes identified in paragraph 2 and the claims of plaintiff that he filed a charge with the Equal Employment Opportunity Commission but denies any liability thereunder.

3. General Mills acknowledges the existence of the statutes identified in paragraph 3 but denies any liability thereunder.

4. General Mills acknowledges that plaintiff makes certain claims in paragraph 4 of his complaint but denies any liability as to any such claims. Except as specifically admitted herein, General Mills denies each and every allegation of paragraph 4.

5. General Mills admits that plaintiff is a white male but is without sufficient knowledge or information to form a belief as to the truth of plaintiffs citizenship and denies that plaintiff was refused accommodations for his alleged disability. Except as specifically admitted herein, General Mills denies each and every remaining allegation in paragraph 5.

6. Admit.

7. Admit.

8. General Mills incorporates as though fully rewritten herein the averments set forth above.

9. General Mills admits that plaintiff provided General Mills with a statement from his physician in late 1996 indicating that plaintiff was undergoing treatment for stress

and that plaintiff's physician recommended that plaintiff work no more than eight hours per day for eight weeks, General Mills further admits that it allowed plaintiff to work only eight hours per day until May, 1997. General Mills also admits that plaintiff filed a grievance. Except as specifically admitted herein. General Mills denies each and every remaining allegation of paragraph 9.

10. Deny.

11. General Mills incorporates as though fully rewritten herein the averments set forth above.

12. General Mills admits that plaintiff filed a grievance, and that a decision was made by defendant unions to refuse to take plaintiff's case to arbitration. Except as specifically admitted herein, General Mills denies each and every allegation of paragraph 12.

13. Deny.

14. General Mills incorporates as though fully rewritten herein the averments set forth above.

15. Deny.

16. Deny.

17. General Mills incorporates as though fully rewritten herein the averments set forth above.

18. Deny.

19. Deny.

FIRST AFFIRMATIVE DEFENSE

Plaintiff fails to state a claim upon which relief may be granted against General Mills.

SECOND AFFIRMATIVE DEFENSE

Some or all of plaintiff's claims may barred by the applicable statute of limitations or be otherwise time barred.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are or may be barred by the doctrines of waiver, estoppel and laches.

WHEREFORE, defendant General Mills requests judgment dismissing the complaint with prejudice plus an award of expenses incurred herein including costs and attorneys fees and any other relief deemed just and equitable.

Respectfully submitted.

Jennifer J. Dawson (0033707)
Roman Arce (0059887)

By /s/_____

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by ordinary U.S. Mail, postage prepaid, this 19th day of May, 1999, to Francis J. Landry, Wasserman, Bryan, Landry & Honold, 300 Inns of Court Building, 405 North Huron Street, Toledo, Ohio 43604; Joan Torzewski, Lackey, Nusbaum, Harris, Reny & Torzewski, LPA, Two Maritime Plaza, Third Floor, Toledo, Ohio 43604; and Richard Helfand, 1125 Grand Boulevard, Suite 1500, Kansas City, Missouri 64106

/s/_____

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:99CV7020

[Filed July 30, 1999]

Terry R. Boerst,	)
Plaintiff,	)
	)
v.	)
	)
General Mills Operations, Inc., et al.,	)
Defendants	)
	)

STIPULATION AND ORDER

Now come the undersigned counsel for the respective parties and hereby stipulate that the First Amended Complaint may be dismissed in its entirety as to Defendants, American Federation of Grain Millers, and American Federation of Grain Millers Local 58 AFL-CIO, CLC, said dismissal to be with prejudice with the further provision that each party bear its own costs and attorney fees. The Plaintiff's undersigned counsel further stipulates that the First Claim for Relief may be dismissed with prejudice as to Defendant, General Mills, Inc., and that, as a result of said dismissals, the case shall proceed as to Defendant, General Mills, Inc., only on the

Third and Fourth Claims for Relief set forth in the First Amended Complaint filed in this action on April 23, 1999.

For good cause shown and based upon the above stipulation it is **ORDERED, ADJUDGED AND DECREED** that the First Amended Complaint be and is hereby dismissed in its entirety with prejudice as to Defendants, American Federation of Grain Millers, and American Federation of Grain Millers Local 58, AFL-CIO, CLC. It is **FURTHER ORDERED, ADJUDGED AND DECREED** that as to the parties affected by the above dismissals each party shall bear its own costs and attorney fees. It is **FURTHER ORDERED, ADJUDGED AND DECREED** that the First Claim for Relief be and hereby is dismissed with prejudice as to Defendant, General Mills, Inc. It is **FURTHER ORDERED, ADJUDGED AND DECREED** that, as a result of said dismissals, the case shall proceed as to Defendant, General Mills, Inc., only on the Third and Fourth Claims for Relief set forth in the First Amended Complaint filed in this action on April 23, 1999.

IT IS SO STIPULATED:

/s/_____
Francis J. Landry,
attorney for Plaintiff,
Terry Boerst

/s/_____
Joan Torzewski,
attorney for Defendant,
American Federation of
Grain Millers Local 58

IT IS SO ORDERED:

/s/_____
U.S. District Judge

7/29/99
Date

/s/_____
Richard Helfand,
attorney for Defendant,
AFGM International Union
AFL-CIO, CLC

/s/_____
Jennifer J. Dawson
attorney for Defendant,
General Mills Operations, Inc.

APPENDIX H

Kenneth H. Adler, M.D.

6545 West Central Avenue
Suite 206
Toledo, Ohio 43617
419.841.3003

October 8, 1997

ATTN: CLAUDIA
GENERAL MILLS
RE: TERRY BOERST

Dear Claudia,

Mr. Boerst is restricted to 40 hours per week. Mr. Boerst is continuing with regular outpatient psychotherapy and medication management and is currently taking Zoloft 100mg his diagnosis is depressive disorder and his prognosis is fair.

If you need additional information or if I can be of further assistance, please feel free to contact me.

Sincerely,

/s/ _____
Kenneth H. Adler, M.D.

Various Letters Regarding Psychiatric Evaluation of Terry R. Boerst

Harbor
Behavioral Healthcare

Employee Assistance Division . 4334 Secor Road .
Toledo, Ohio 43623 . 419-475-5338

June 26, 1997

Dr. Hudson Jones
620 W. Bancroft
Toledo, Ohio 43620

RE: Assessment for Terry Boerst

Dear Dr. Jones,

This letter is regarding Mr. Terry Boerst. I initially met with Mr. Boerst on 5/15/97, followed by two additional visits on 5/22/91 and 5/29/97. During these sessions we discussed significant symptoms of stress that Mr. Boerst had been experiencing for approximately the last 6 months. These symptoms included anxiety and anxiety attacks, difficulty sleeping, poor concentration and preoccupation with problems at work. The symptoms appeared to be causing significant distress for Mr. Boerst at work and outside of work hours. Mr. Boerst reported that he has experienced numerous problems at work dating back many years, and that there is a direct connection between the above symptoms of stress and his employment. He was seeking support on how to address the problems at work with the hope that some of the work-related stress he was experiencing could be relieved.

It appears that there is a direct link between the above symptoms and Mr. Boerst's work environment. My recommendations for Mr. Boerst include addressing appropriate issues with his employer, consulting wit you regarding a restricted work hours so the above symptoms can be managed or alleviated, and supportive counseling to address ongoing stress-related symptoms.

I hope this information is helpful to you. Please feel free to call me is you need more information or if you have any questions.

Sincerely,

/s/_____

Lisa Rectenwald,
MRC, LPC, CCDC III, NCAC I
Clinical Therapist
Harbor Employee Assistance

Various Letters Regarding Psychiatric Evaluation of Terry R. Boerst

Psychiatric evaluation

RE: Terry Boerst
DOB: 12/4/42
SS#: 280-38-6414
Date of eval: 10/20/97

Mr. Boerst is a 54 year old male referred for an independent medical examination by General Mills. He arrived on time for the appointment. Mr. Boerst has been a GM employee for 27 years. He described working overtime, as a routine for him. He sometimes work two or three days and then asked to come in early the next day for over time. His normal hours are from 7:00 AM to 3:00 PM, and if asked to come in early, he comes in at 3:00 AM and leaves at 3:00 PM. It affects his sleeping, "worrying about coming in early", and more often than not they do have to work overtime, rather than every 8-10 days as reported. He stated that there is no control over it, given that someone has to cover, if any one calls in. As a result of the pressure with working the overtime, he began experiencing anxiety. "He tried to handle it on his own", but the symptoms increased over the past six months to one year. He stated that he does not know how it all began, but he sought the assistance of his doctor. He reported feeling anxious, chest pain, stomach pain, nausea, and "feeling as if he is going nuts." He then developed a fear of being late to work, and noticed "his heart racing." His primary care doctor recommended an eight hour restriction, which had to be renewed, periodically. Somehow the last time it was scheduled for renewal, it did not happen, and he was forced to work overtime again, which aggravated his symptoms. He stated that he has been off work since May

14, 1997 due to "the company not accepting his eight hour restrictions." He has been suffering from "depression, anxiety and fatigue." He was in treatment with his primary care doctor, Dr. Jones, who referred him to Harbor Behavioral health, about four months ago. He was evaluated by Lisa Rectenwald, who also recommended the eight hour restrictions. Mr. Boerst was then referred to Dr. Adler, a psychiatrist, with whom he is contact every two weeks, and he prescribed for him Zoloft 100 mg per day. He believes the medication has helped "a little, because he has not been as easily upset." He continues to experience difficulty sleeping, about two to four hours at night. He reported decrease energy, concentration, and fluctuating sleep. He denied any suicidal thoughts, nor hallucinations, nor obsessive compulsive symptoms.

Past medical history
He has no medical problems nor medication allergy.

Past psychiatric history
As described above. He was seen by a psychologist due to work related problems, about nine years ago. "After being tested and taking the results to his job, his problems ended." Twenty years ago, he was also seen by a psychologist due to work related issues.

Family history
He believes his father was seen by a psychiatrist, in the past. His brother is an alcoholic.

Various Letters Regarding Psychiatric Evaluation of Terry R. Boerst

Social history

Mr. Boerst was born and reared in Toledo. He graduated from Libby high school. He has one brother and one sister. He has been a General Mills employee 27 years, and stated that his problems at work began with his need for an eight hour restriction. He denied any history of violence at work, although "will stand up for himself. He recalled on one occasion, a foreman was "yelling at him", and his response was to tell him to "get out of his face." About nine years ago, "while trying to help a fellow employee, who was an addict", he was written up for leaving the department. He was "harassed for a while after that." He saw a psychologist, after which he had no problems for eight years. Before working with General Mills, he worked for Toledo Steel. He is married 32 years and has three children. He lives alone with his wife. He described a typical day as "doing little except, cleaning the house, doing some laundry." He denied any alcohol use, being sober 11 years. He smokes one pack of cigarettes per day. He stated that he wants to return to work, work Saturday and Sunday, but is unable to tolerate being on call for overtime, without significant anxiety.

Mental Status examination.

Mr. Boerst is a 54 year old male who looked about his stated age. He was casually dressed and groomed. He appeared relaxed during the interview. He was alert and oriented to person, place and time. His mood was mildly dysphoric. His affect was appropriate. His speech was fluent without delusions. He was able to interpret several proverbs given him, appropriately. His concentration was intact with serial

subtraction, but his attention revealed some deficits with digit span. His memory for recent and remote events were intact. His immediate recall was 2/3 items in 4 minutes. His judgment and insight was good.

Diagnosis Axis	I	Anxiety disorder Nos. Major depression - mild
	II	Defer
	III	No medical problems
	IV	Moderate work related stress
	V	GAF - 60

Summary

Mr. Boerst is a 54 year old married male with a history of work related stress, and the subsequent development of an anxiety and depressive disorder. He continues to report significant symptoms.

It is clear that he has developed an anxiety disorder in response to his work hours, and his interpretations of it. It is very possible to develop an anxiety disorder as he has described.

It is my recommendations that his work restrictions be granted. It is likely that the restrictions will be permanent, given that the cognitive interpretation of his overtime will likely continue, and will produce the secondary anxiety symptoms. The antidepressant he has been prescribed is often used for depression, coupled with anxiety. Sometimes the addition of Buspar or a benzodiazsoine helps reduce the

anxiety further. The medications treat the symptoms, but does not cure the problem.

Although he continues to report symptoms, they would not prevent him from returning to a restricted work day, and as mentioned above, there is no evidence to support the potential for violence.

Submitted by:

/s/_____

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